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SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

MATTHEW O. REILLY,

*Petitioner,*

*vs.*

CAULDWELL-WINGATE COMPANY, INC., BERNARD J. ROSEN and MAX STAHL,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.**

Petitioner Matthew O. Reilly respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 14, 1972.

## OPINION BELOW

No opinion was rendered by the Court of Appeals. The opinion of the District Court, unreported, appears in the Appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 14th, 1972. A timely petition for rehearing

was denied on April 10, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

## QUESTIONS PRESENTED

1. May a federal court, in a diversity action, dismiss a complaint by applying a state statute of limitations contrary to controlling state law as expressed by applicable and controlling state decisions, contrary to the rule established by this court in *Erie v. Tompkins*, 304 U.S. 64, *Six Co. of Cal. v. Joint Highway District*, 311 U.S. 180, and *Fidelity Trust Co. v. Field*, 311 U.S. 169?

2. May a federal court dismiss a complaint (not previously amended) for being too vague and indefinite without an opportunity to the plaintiff to amend to correct the deficiencies, and for insufficiency contrary to the rule set by this court in *Conley v. Gibson*, 355 U.S. 41, and *U.S. v. Hougham*, 361 U.S. 958, 80 S. Ct. 590.

3. May a federal court dismiss a complaint as seeking to enforce an agreement that is contrary to public policy, when the law (Federal Code of Regulations) relied on by the court actually permits the agreement set out, as one of the exemptions to the regulation?

4. Doesn't res judicata bar a federal court from granting summary judgment for defendants on an issue previously decided, in a summary judgment motion, against defendants by the same court, in a prior action between the same parties?

5. May a federal court rely on a defective pleading to deprive a litigant of his day in court on the merits, without an opportunity to amend, contrary to this court's holding in *Foman v. Davis*, 371 U.S. 178, 83 S.Ct., 227 .

## STATUTORY PROVISIONS INVOLVED

41 CFR 1-1.503 Covenant

Executive agencies shall include in every negotiated or advertised contract a "covenant against contingent fees" substantially as follows (set forth as clause 11 of Standard Form 19, Invitation, Bid and Award (Construction, Alteration or Repair); as clause 17 of Standard Form 23-A, General Provisions (Construction Contract); and as clause 20 of Standard Form 32, General Provisions (Supply Contract);

Covenant Against Contingent Fees:

The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

41 CFR 1-1.504-1 Use of principles and standards.

The principles and standards set forth in this subpart are intended to be used as a guide in the negotiations, awarding, administration, and enforcement of Government contracts.

41 CFR 1-1.504-2 Contingent character of the fee.

Any fee whether called commission, percentage, brokerage,

or contingent fee, or otherwise denominated, is within the purview of the covenant if, in fact, any portion thereof is dependent upon success in obtaining or securing the Government contract or contracts involved. The fact, however, that a fee of a contingent nature is involved does not preclude a relationship which qualifies under the exceptions to the prohibition of the covenant.

41 CFR 1-1.504-3 Exceptions to the prohibition.

There are excepted from the prohibition of the covenant "bona fide employees" and "bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business."

41 CFR 1-1.504-4 Bona fide employee.

(a) The term "bona fide employee," for the purpose of the exception to the prohibition of the covenant, means an individual (including a corporate officer) employed by a concern in good faith to devote his full time to such concern and no other concern and over whom the concern has the right to exercise supervision and control as to time, place, and manner of performance of work. It is recognized that a concern, especially a small business concern, may employ an individual who represents other concerns. The factors set forth in § 1-1.-504-5(b), except (4) thereof, shall be applied to determine whether such an individual comes within the exception to the prohibition of the covenant.

(b) The hiring must contemplate some continuity and it may not be related only to the obtaining of one or more specific Government contracts.

(c) An employee is not "bona fide" who seeks to obtain any

Government contract or contracts for his employer through the use of improper influence or who holds himself out as being able to obtain any Government influence.

(d) A person may be a bona fide employee whether his compensation is on a fixed salary basis or, when customarily in the trade, on a percentage, commission or other contingent basis, or a combination of the foregoing.

41 CFR 1-1.504-5 Bona Fide established commercial or selling agency maintained by the contractor for the purpose of securing business.

(a) An agency or agent is not "bona fide" which seeks to obtain any Government contract or contracts for its principals through the use of improper influence or which holds itself out as being able to obtain any Government contract or contracts through improper influence.

(b) In determining whether an agency is a "bona fide" established commercial or selling agency maintained by the contractor for the purpose of securing business," the factors set forth below shall be considered. They are necessarily incapable of exact measurement or precise definition and it is neither possible nor desirable to prescribe the relative weight to be given any single factor as against any other factor or as against all other factors. The conclusions to be reached in a given case will necessarily depend upon a careful evaluation of the agreement and other attendant facts and circumstances.

(1) The fees charged should not be inequitable and exorbitant in relation to the services actually rendered. That is, the compensation should be commensurate with the nature and extent of the services and should not be excessive as compared with the fees customarily allowed in the trade concerned for

similar services related to commercial (non-Government) business. In evaluating reasonableness of the fee, there should be considered services of the agent other than actual solicitation, as for example, technical, consultant or managerial services, and assistance in the procurement of essential personnel, facilities, equipment, materials, or subcontractors for performance of the contract.

(2) The selling agency should have adequate knowledge of the products and the business of the concern represented, as well as other qualifications necessary to sell the products or services on their merits.

(3) There should be ordinarily a continuity of relationship between the contractor and the agency. The fact that the agency has represented the contractor over a considerable period of time is a factor for favorable consideration. It is not intended, however, to disqualify newly established contractor-agent relationships where a continuing relationship is contemplated by the parties.

(4) It should appear that the agency is an established concern. The agency may be either one which has been in business for a considerable period of time or a new agency which is a presently going concern and which is likely to continue in business as a commercial or selling agency in the future. The business of the agency should be conducted in the agency name and characterized by the customary indicia of the conduct of a regular business.

(5) The fact that a selling agency confines its selling activities to the field of Government contracts does not, in and of itself, disqualify it under the covenant. The fact, however, that the selling agency is employed to secure business generally, that is, to represent the concern in connection with sales to the

Government as well as regular commercial sales to non-Government activities is a factor entitled to favorable consideration in evaluating the case as one coming within the authorized exception. Arrangements confined, however, to obtaining Government contracts, particularly those involving a selling agency organized immediately prior to or during periods of expanded procurement resulting from conditions of national emergency, must be clearly scrutinized.

41 CFR 1-1.504-6 Fees for "information."

Contingent fees paid for "information" leading to obtaining a Government contract or contracts are included in the prohibition and, accordingly, are in breach of the covenant unless the agent qualifies under the exception as a bona fide employee or a bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business.

41 CFR 1.506 Interpretation of the representation.

(a) For the purpose of the representation and agreement required from the prospective contractor, as described in §1-1.505, the definition of "bona fide employee" is as specified in 1-1.504-4.

(b) The fact that the prospective contractor retains a person who does not devote his full time solely to the prospective contractor does not necessarily mean that the relationship involved is in violation of the covenant against contingent fees or that there is any stigma attached to the contractor-agent relationship. It does mean, however, that the prospective contractor must fill out the representation in the affirmative and, as required, furnish information with respect to such employment of retention.

(c) If the representation would otherwise be answered in the affirmative, the fact that the person employed or retained by the bidder or contractor is an attorney, or a public relations consultant, or has any other special or professional title, does not permit answer in the negative.

41 CFR 1-1.508-3 Misrepresentations or violations of the covenant against contingent fees.

In case of misrepresentation, or violation or breach of the covenant against contingent fees, or some other relevant impropriety, the executive agency concerned shall take one or more of the following actions, or other action, as may be appropriate:

(a) If an award has not been made, or offer has not been accepted, determine whether the bid or offer should be rejected.

(b) If an award has been made or offer has been accepted, take action to enforce the covenant in accordance with its terms; that is, as the best interests of the Government may appear, annul the contract without liability or recover the amount of the fee involved.

(c) Consider the future eligibility as a contractor of the bidder or contractor in accordance with established procedure.

(d) Determine whether the case should be referred to the Department of Justice in accordance with established procedure with respect to determining matters of fraud or criminal conduct.

New York Civil Practice Act (CPA), Sec. 48, Subd. 5:

48. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:

* * *

5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

* * *

New York Civil Practice Act (CPA), Sec. 53:

53. Limitation where none specifically prescribed. An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues.

New York Civil Practice Law and Regulations (CPLR) Sec. 206, Subpar. C: Computing periods of limitation in particular actions.

* * *

(c) Based on fraud. In an action based upon fraud, the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it.

New York Civil Practice Law and Regulations (CPLR) Sec. 213, Subpar. 6:

Actions to be commenced within six years: where not otherwise provided for; on contract; on sealed instrument; on bond or note, and mortgage upon real property; by state based on misappropriation of public property; based on fraud or mistake; to establish a will; by corporation against director, officer or stockholder. The following actions must be commenced within six years:

* * *

6. An action based upon fraud or mistake;

7. An action to establish a will; where the will has been lost, concealed or destroyed, the time within which the action must be commenced shall be computed from the time when the plaintiff or his predecessor in interest discovered the loss, concealment or destruction, or could with reasonable diligence have discovered it; and

8. An action by or on behalf of a corporation against a present or former director, officer or stockholder for an accounting, or to procure a judgment on the ground of fraud, or to enforce a liability, penalty or forfeiture, or to recover damages for waste or for an injury to property or for an accounting in conjunction therewith.

## STATEMENT OF THE CASE

On October 26, 1961, plaintiff entered into an oral agreement with defendants, through defendant Rosen, who was acting on behalf of corporate defendant Cauldwell-Wingate, Inc., (Rosen was then Vice-President of the corporation and was President at the time this litigation was commenced).

Plaintiff was a licensed real estate broker, resident of New Jersey, and defendants were New York residents, the corporate defendant being a construction company officed in New York. The amount in controversy exceeds $10,000, and the action was instituted in the district court on diversity jurisdiction.

As a result of plaintiff's performance under the agreement, defendant Cauldwell-Wingate, Inc. (hereinafter 'C-W') entered into contracts for completion of 3 Federal Housing Administration projects in New Jersey.

These contracts were entered into on April 4, 1963. C-W received final payment thereon on November 9, 1964.

A prior action by plaintiff against C-W and Rosen was dismissed—with the following sequence of relevant events:

The action was commenced on March 26, 1965 (SDNY, 65 Civ. 913), the complaint setting forth 5 counts.

Plaintiff was represented by counsel who withdrew. New counsel also withdrew, leave being granted in June 1965.

For some time plaintiff was forced to proceed pro se, through depositions, unable to retain new counsel through lack of funds to pay fees, but was finally referred to present counsel and forma pauperis relief was applied for and granted.

Present counsel moved, in the prior action, for leave to amend. Defendants cross-moved for summary judgment. The court (Weinfield, D.J.) denied both motions, holding "The nature of the services allegedly rendered by plaintiff must await trial to determine if, as the defendants contend, recovery is barred by virtue of the prohibition against contingent fees. See 41 CFR. Sec. 1-1. 500, et Seq.". (Opinion appended)

Depositions taken in the prior action, which this court may judicially notice (and the following is therefor extracted therefrom), establish a course of dealing between plaintiff and defendant Rosen, from October 1961 per plaintiff's version, and from 1962 per Rosen's version, Rosen testifying that, prior to October 1961, C-W had not performed any construction in Jersey City or Hudson County, that plaintiff had called on him to interest him in building work in Jersey City, they made some trips to Jersey City and looked at various areas, that plaintiff gave him information relating to a Holland Tunnel project

leading to C-W's offer to enter into an option thereon, and that other areas were looked at, other than the 3 FHA projects which were actually contracted for.

In order to promptly appeal the denial of the motion to amend, plaintiff stipulated to a dismissal on the events, without a trial, relying on *Roloff v. Arabian American Oil Co.*, 421 F. 2d 240 (2 Cir.).

The Second Circuit affirmed without opinion, and denied rehearing on October 21, 1970, and the mandate issued November 6, 1970.

Plaintiff thereupon commenced this action on December 10, 1970, alleging a joint venture between plaintiff and defendants and fraud; not discovered until consultation with present counsel, in October 1968.

Defendants moved to dismiss for:

1 – Res judicata

2 – Statute of limitations

3 – Insufficiency,

the district court treating the motion as one for summary judgment; and granting the motion on all 3 grounds.

The district court held that:

1) plaintiff had his day in court in the prior action and cannot twice litigate the same claim.

2) The present claim is barred by the Statute of Limitations

of 6 years–CPLR 203 and 213 calculated from the receipt of final payment by C-W on November 9, 1964.

3) a) The complaint is vague and indefinite, and

b) The claimed agreement would be void as against public policy, as a contingent fee contrary to cited regulations (41 CFR 1-1.500, et seq.).

The Second Circuit affirmed, without opinion.

## POINT I

## THE DECISION IS AN INTER-CIRCUIT CONFLICT WITH THE DECISION IN *ROLOFF v. ARABIAN AMERICAN OIL CO.*, 421 F.2d 240 (2 Cir. 1970).

In *Roloff v. Arabian American Oil Co.*, 421 F. 2d, 240 (2 Cir. 1970), the Second Circuit allowed re-instatement of dismissed counts where it was clear dismissal had been stipulated to for the sole purpose of taking an immediate appeal.

In the case at bar, the Second Circuit held the stipulated dismissal to constitute a res judicata bar, when, in fact, the stipulated dismissal in the prior action was for the same purpose as in *Roloff*.

Plaintiff, relying on the *Roloff* procedure, should not be penalized, as herein, by being deprived of his day in court.

## POINT II

## THE COURT BELOW FAILED TO FOLLOW CONTROLLING STATE COURT DECISIONS AND ERRONEOUSLY CONSTRUED THE STATE'S STATUTE OF LIMITATIONS.

The court below applied CPLR 213 to time-bar plaintiff's complaint on the basis of a 6 year time limitation, from November 1964.

The complaint sets up a joint venture and fraud, and alleges discovery thereof in October 1968 (Complaint, par. Seventh).

CPLR 213, Subpar. 6, provides in pertinent part:

> "The following actions must be commenced within six years:
>
> * * *
>
> 6. an action based upon fraud or mistake;"

The comment in respect to the subpar., Cahill-Parsons New York Civil Practice, shows it was taken from former CPA, see 48 (5).

CPLR Sec. 206, Subpar. C, provides:

> "In an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it."

The CPLR replaced the former CPA on September 1, 1964 (Laws 1964, C.252).

Laws of 1965, c.248, added subpar. 9 to CPLR 213, providing that the time, in an action based on actual fraud, ran from the time of discovery.

In *Altman v. Finkel*, (1-A.D. 1945), 52 N.Y. Supp. 2d 634, at p. 638, it was held that a cause of action for actual fraud did not accrue till the discovery thereof. See, also, *Hearn 45th St. Corp. v. Jano*, (1940), 283 N.Y. 139, 141, 27 N.E. 2d 814, 815; *Nasaba Corp. v. Harfred Realty Corp.*, (1942), 287 N.Y. 290, 39 N.E. 2d 243.

It follows that the court below failed to apply controlling state court decisions as required by this court in *Erie v. Tompkins*, 304 U.S. 64, *Six Co. of Cal, v. Joint Highway District*, 311 U.S. 180, and *Fidelity Trust Co. v. Field*, 311 U.S. 169.

## POINT III

## RES JUDICATA DOCTRINE BARRED GRANT OF SUMMARY JUDGMENT MOTION.

On the same issue presented to the district court in the prior action between the parties, summary judgment was denied by Judge Weinfeld on the ground that the events should be developed at the trial.

The district court, in the case at bar, clearly touched on this point in its opinion but went on to grant summary judgment on the ground the agreement was not enforceable as contrary to public policy as expressed in 41 C.F.R. 1.1-500 Et seq.

However, the relationship between plaintiff and defendants subsisted for some period of time prior to the F.H.A. contracts which were subject to C.F.R., from October 1961 to April 1963, and the parties had looked into various other potential

contract areas during that time. The exemption provisions of 41 C.F.R. 1.1-504-3, 1.1-504-4, 1.1-504-5, 1.1-504-6 and 1.1-506, apply herein.

41 C.F.R. 1-1.508-3 provides only for sanctions against the contractor for violations.

The question was, therefore, not appropriate for summary judgment since the prior action disposition thereof was res judicata and a material issue of fact was present.

The court below, therefore, has so far deviated from its appropriate course of action as to call for the exercise of this court's supervisory power over the federal courts to the end that an important question of federal practice and procedure may be resolved by this court.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circut.

Respectfully submitted,

JACOB RASSNER
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Of counsel and on the Brief:
LEONARD H. WALLACH
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**OPINION**

65 Civil 913

This action, commenced in March 1965, based upon a claim that allegedly accrued seven or more years ago, has, since its filing, been marked by dilatory tactics on the part of the plaintiff. Within three years after its commencement it appeared on the Rule 23 Dismissal Calendar a number of times and plaintiff was granted repeated extensions to file the note of issue. Finally, on August 1, 1968, after extensive depositions had been taken of the parties and several witnesses, a note of issue and a statement of readiness were filed. Now, on the eve of trial, plaintiff moves to serve an amended complaint containing charges which, if true, were clearly within his knowledge when his alleged claims first accrued in October 1962, or soon thereafter.

While Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend pleadings shall be freely granted, the Rule does not contemplate that it be used to harass or to prejudice an opposing party. Plaintiff's repeated statements in his sworn deposition, in his complaint and in affidavits that his claim was based upon an agreement of compensation for services in the form of brokerage commissions and brokerage fees raises a substantial question of his good faith in now proposing an amended complaint alleging a "joint venture," with freewheeling charges of conspiracy by the defendants and others not parties to this suit, and with an increase in his damage demand from a modest $28,141 to a sum in excess of two million dollars. The constant sworn reiteration of his original claim of brokerage commissions suggests there is no basis for any contention that the failure to allege the present claim of joint venture was due to any oversight or inadvertence. The ingenuity of recently retained counsel in proposing the

amended complaint to meet a defense set forth in defendants' pretrial memorandum, which cited a statute seemingly barring plaintiff's present claim, does not justify this eleventh hour maneuver, which also appears to be a ruse to reopen discovery proceedings. Defendants, no less than plaintiff, are entitled to their day in court—a new round of pretrial discovery proceedings only means further delay.

In sum, plaintiff's motion, in the exercise of discretion, is denied for undue delay, bad faith and dilatory motive. *See Bradick v. Israel,* 377 F. 2d 262, 263 (2d Cir.), *cert. denied,* 389 U.S. 858 (1967); *Vine v. Beneficial Finance Co.,* 374 F.2d 627, 636-37 (2d Cir.), *cert. denied,* 389 U.S. 970 (1967).

The defendants' motion for summary judgment is denied. The nature of the services allegedly rendered by plaintiff must await trial to determine if, as the defendants contend, recovery is barred by virtue of the prohibition against contingent fees. *See* 41 C.F.R. § 1-1.500, *et seq.*

Dated: New York, N.Y.
January 26, 1970

s/ Edward Weinfeld
United States District Judge

[Reilly v. Cauldwell Wingate Co.]

**OPINION**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

---

MATTHEW O. REILLY,

Plaintiff,

-against-

CAULDWELL-WINGATE COMPANY, INC., a corporation of the State of New York or one of the other states of the United States, BERNARD J. ROSEN, MAX STAHL and STANLEY STAHL,

Defendants.

---

APPEARANCES:

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Of Counsel

HYATT, District Judge,

This is a motion for summary judgment by defendants Cauldwell-Wingate, Inc. (CW), Rosen, and Stanley Stahl. Fed.

R. Civ. P. 56. The other named defendant, Max Stahl, died before the action was commenced.

The action was commenced on December 10, 1970. By order of Judge Croake filed December 10, 1970, Reilly (who is represented by counsel) was permitted to proceed in forma pauperis. There has been no answer. By stipulation, the time for defendants to answer was extended to a day after the disposition of this motion for summary judgment.

It appears without dispute that plaintiff is a real estate broker in New Jersey, and that CW is a building construction company in New York, Rosen is its president and was formerly its vice president, and Stanley Stahl owns 50% of the stock of CW. All defendants are citizens of New York, plaintiff is a citizen of New Jersey. The action involves more than $10,000. There is diversity jurisdiction. 28 U.S.C. § 1332.

The complaint has two separate claims, each styled a cause of action. The complaint is an imposition on the Court and in violation of the Rules because it does not contain "a short and plain statement of the claim" (Fed. R. Civ. P. 8(a)(2)) but is long, confused, vague, inconsistent, and indefinite.

The first claim seems to be for breach of an 'oral contract' said to have been made in October 1961. Plaintiff avers in substance that he was a party to the oral contract and that he was a party; whether he claims that the individual defendants or some of them were parties cannot be told. The claim is for a "participation" in certain amounts realized by CW for the completion of three Federal Housing Administration projects in New Jersey, namely, Gregory Park, 515 Mt. Prospect, and 555 Mt. Prospect. The terms of the oral contract, including the agreed basis for calculating the "participation" of Reilly, are not sufficiently set out to be understood.

The second claim asserts a conspiracy by defendants with many others, public officials and otherwise, to deny to the plaintiff his agreed share of said profits on the three FHA projects and to perpetrate a fraud upon the taxpayers. This second claim adds nothing to the first and is on its face plainly insufficient as a matter of law. The extravagant charges, the naming of so many FHA and New Jersey officials and the florid rhetoric raise a doubt whether this plaintiff is proceeding in good faith. However that may be, for present purposes the second claim may be ignored.

It appears without dispute that FHA and CW, after competitive bidding, made three contracts on April 4, 1963 for the completion by CW of the three projects—Gregory Park in Jersey City and 515 Mt. Prospect and 555 Mt. Prospect in Newark. These three projects appear to have contained apartment housing and their construction had been started by another building company which (because of financial difficulties) could not complete them. FHA was the mortgagee. FHA sent out many invitations to bid for completion of the three projects. There were at least two bids and the contracts were awarded to CW. The projects were in fact completed by CW. FHA paid to CW the contract amounts. The last payment by FHA to CW was received on November 9, 1964.

## The Prior Action

Reilly commenced an action (65 Civ. 213) in this Court on March 26, 1965. The defendants were CW and Rosen. Reilly was represented by counsel.

The complaint purported to state five claims, each styled a "cause of action". The complaint suffered from the same infirmities as that in the case at bar.

The first claim was that plaintiff made an oral contract in October 1962 with CW, which contract incorporated the terms of an "original" oral contract made with "defendants" on October 26, 1961. It was averred that under this agreement plaintiff was entitled to a "regular real estate commission" on any projects for which CW signed a contract; that on April 4, 1963 through plaintiff's efforts a contract was signed by "defendants" for completion of the Gregory Park and two Mt. Prospect projects; that when such contract was signed Reilly became entitled to a commission of 5% of the "builder's fee of $562,827" and that this amounted to $28,141 which defendants had refused to pay.

The second claim was merely a repetition of the first, accompanied by a more elaborate statement of alleged evidence.

The third claim was a second repetition of the first, but is based only on the alleged October 26, 1961 oral contract and attempts to anticipate, by averring ratification, a defense that Rosen had no authority to bind CW.

The fourth claim was based on the same alleged October 26, 1961 oral agreement, it anticipates, by averring estoppel, a defense of invalidity, and for good measure it throws in a quantum meruit claim on the Gregory Park and two Mt. Prospect projects.

The fifth claim was against Rosen only and anticipates a defense that Rosen had no authority. It avers that Rosen misrepresented his authority and defrauded Reilly.

Under each claim, the demand was for $28,141. This was calculated on the 5% "commission" basis already explained.

By stipulation and order filed June 8, 1965, the attorneys

for Reilly were removed and he was to act pro se until other counsel were retained.

An extensive deposition of Reilly was taken by defendants on August 30 and September 10, 1965.

Nothing much then happened until on December 8, 1967, Chief Judge Sugarman made an order requiring Reilly to file a note of issue within 150 days.

New counsel were then obtained by Reilly and on his behalf took the depositions of John Milton, John V. Kenney, and of CW (by Rosen).

New counsel were permitted to withdraw by order of Judge McGohey filed May 3, 1968. The reasons for their withdrawal were that Reilly insisted on bringing in controversies in New Jersey which were irrelevant, that he insisted on the taking of depositions of New Jersey public officials on irrelevant matters, that he insisted the complaint be amended to include additional defendants against whom there was no real claim, and that he created other "difficulties and embarrassments".

On August 1, 1968, Reilly filed a note of issue.

At some time thereafter, Reilly retained his present counsel, Jacob Rassner, Esq., but nothing happened until October 2, 1969, when notice was served of a motion of Reilly for leave to file an amended and supplemental complaint (Fed. R. Civ. P. 15). The proposed amended and supplemental complaint is in large part word for word the same as the complaint in the case at bar.

Defendants then moved for summary judgment on the ground that any agreement as claimed by Reilly would be void

because contrary to regulations forbidding contingent fees in respect of Government contracts. 41 CFR § § 1-1.500 and following.

By order, with memorandum opinion, filed January 26, 1970, Judge Weinfeld denied the motion of Reilly and also the motion of defendants.

As to the motion of Reilly, Judge Weinfeld noted that his action had been "marked by dilatory tactics" on his part and stated that the motion for an amended pleading raised "a substantial question of his good faith". Judge Weinfeld referred to the "ingenuity of recently retained counsel" and said that the motion appeared "to be a ruse to reopen discovery proceedings". Judge Weinfeld concluded that the motion for Reilly ought to be denied "for undue delay, bad faith and dilatory motive".

As to the motion of defendants, Judge Weinfeld seemed to feel that the prohibition against contingent fees "seemingly" barred "plaintiff's present claim" but that whether it applied ought to be determined after development at trial of the "nature of the services allegedly rendered by plaintiff".

Reilly then decided not to go to trial on his complaint but to appeal the decision of Judge Weinfeld refusing to permit an amendment.

A stipulation was made by Reilly, his counsel, and counsel for defendants dismissing the complaint "on the merits". An order was then made on April 10, 1970 by Judge Levet on the stipulation and directing entry of judgment for defendants.

An appeal by Reilly from the judgment raised in the Court of Appeals the propriety of Judge Weinfeld's order denying the

motion for leave to serve an amended and supplemental complaint. The appeal was heard on October 5, 1970 (Moore, Smith, and Anderson, C.JJ.). The judgment and order of this Court were affirmed unanimously from the Bench. There is no opinion and the decision is not reported. A petition by Reilly for a rehearing was denied on October 21, 1970 and the mandate issued on November 6, 1970.

### The Case at Bar

As already noted, this action was commenced on December 10, 1970, and is simply an attempt to evade the force of the earlier final judgment.

### The Grounds for This Motion

The defendants urge that they should have summary judgment because

(1) the former decision has adjudicated all the claims;

(2) all the claims are barred by the statute of limitations; and

(3) there is no material issue as to facts entitling the defendants to judgment on the merits. (This ground is narrowly phrased as a failure of the complaint to state a sufficient claim, which is indeed true, but facts outside the pleadings have been considered and summary judgment is clearly appropriate).

### The Motion Must be Granted

The three grounds urged for the motion all have merit.

In the first place, there is nothing whatever suggested in pleadings or in affidavits or otherwise – which would remotely

indicate a claim against defendant Stanley Stahl. Evidently he was brought in – as former counsel declined to do – as a kind of *in terrorem* activity.

As to the other two defendants, Reilly has already had his day in Court and cannot twice litigate the same claim.

It seems clear that the same claim is asserted in the present action as in the prior one – namely, a contract claim for compensation on account of the three New Jersey projects for which CW was awarded contracts by FHA. True, when Reilly tried to amend in the prior action, defendants argued that he was raising entirely new and different matters. This argument was lacking in substance then and certainly cannot affect the situation now. The claim is for compensation under an oral agreement said to have been made in October 1961. In the first action, the claim was for simple breach of contract. In the present action, it is said that the contract created a "joint venture" and plaintiff sues for his "participation". The substance of the claim is the same. Changing the theory and the description of the claim does not avoid the bar of the earlier judgment. *Wolcott v. Hutchins,* 280 F. Supp. 359, 562-563 (Mansfield, J.) S.D.N.Y. 1968). Affirmed on opinion below, 404 F.2d 937 (2d Cir. 1969).

The present claim is equally barred by the statute of limitations of six years (CPLR § § 203, 213). The claim as stated by plaintiff accrued no later than the receipt by CW of a "selling price", "builders' fees", etc. (see, for example, complaint, para Fifth). The last receipt by CW on the three projects in suit was on November 9, 1964. The action was commenced too late.

It must be emphasized that despite the windy verbiage in the complaint, the only transactions on which any claim is

predicated are the three project contracts – Gregory Park, 515 Mt. Prospect, and 555 Mt. Prospect. These are the only transactions" CW had in New Jersey. Neither in pleading nor in affidavit does Reilly suggest that there were any other transactions.

Finally, defendants would be entitled to summary judgment on the merits. If plaintiff were to prove every averment as to the claimed agreement, it would be too vague and indefinite for enforcement by any Court. Neither the extent nor the length of the "joint venture" is defined, nor are the claimed provisions for the "participation" of Reilly sufficiently definite for any Court to calculate what would ever be due him.

Moreover, there can be no doubt but that the claimed agreement, if specific enough to be enforced, would be void as against public policy. It would be, in reality, a contingent fee to plaintiff which is contrary to the cited regulations. True, Judge Weinfeld denied summary judgment on this ground but at a much earlier stage. In any event, it seems a bar to whatever claim the plaintiff might be able to show.

This action seems peculiarly suitable for decision on a motion for summary judgment. The essential facts appear beyond dispute. Plaintiff has been litigating for over six years and in the earlier action thoroughly ventilated his claim to final judgment against him. There should be an end to such a protracted controversy.

The motion is in all respects granted. There is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law. The Clerk is directed to enter judgment in favor of all defendants except Max Stahl, who died before the action was commenced.

SO ORDERED,

Dated, New York, New York
August 20, 1971

INZER B. WYATT
United States District Judge

FILED
JUL 22 1972
CLERK

IN THE

# Supreme Court of the United States

October Term, 1972

No. 72-5064

MATTHEW O. REILLY,

*Petitioner,*

*against*

CAULDWELL-WINGATE COMPANY, INC., BERNARD J. ROSEN and MAX STAHL,

*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 21, 1972

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IN THE

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MATTHEW O. REILLY,

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*against*

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*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents, Cauldwell-Wingate Company, Inc. and Bernard Rosen submit this brief in opposition to the petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit dated April 6, 1972, affirming without opinion the granting of summary judgment to the respondents dismissing the complaint. Max Stahl, named as a respondent, died before the commencement of the action.

## Counterstatement of Questions Presented

1. Whether this action is barred under the doctrine of *res judicata.*

2. Whether this action is barred by limitation of time.

3. Does the complaint fail to state a claim on which relief can be granted?

## Counterstatement of the Case

The facts are fully and clearly set forth in the opinion of Judge Inzer B. Wyatt (App. 17-28) and need not be repeated. It may be noted, as Judge Wyatt has pointed out, that petitioner instituted a prior lawsuit against respondents Cauldwell-Wingate Company, Inc. and Bernard Rosen in which a stipulation was made by petitioner, his counsel, and counsel for those defendants dismissing the complaint on the merits. Judgment was accordingly entered on that stipulation for the defendants, which was affirmed on appeal, unanimously, from the Bench (App. 24-25).

In the present action, Judge Wyatt granted summary judgment for the respondents (1) on the merits, (2) because the claimed agreement would be void as against public policy and (3) because there is no genuine issue as to any material fact (App. 27).

The Court of Appeals affirmed unanimously without opinion (R. App. 1).

# ARGUMENT

## I

**This action is barred under the doctrine of *res judicata*.**

The claims asserted in this action were dismissed on the merits in the prior action against respondents Cauldwell-Wingate and Rosen (65 Civ. 213). The stipulation of all the parties in that action dismissed the complaint on the merits without prejudice to appellant's right to appeal from the order denying his motion to amend the complaint. On appeal, that order was unanimously affirmed from the Bench.

The facts in that action are the same as those pleaded by the appellant in this action, which Judge Wyatt clearly pointed out. Consequently, he properly held, and the Court of Appeals affirmed, that this action is barred under the doctrine of *res judicata*.

> "There is no doubt that a judgment entered upon a settlement is res judicata as to all questions which were or could have been litigated in the action in which the settlement was entered." *Stuyvesant Insurance Co.* v. *Dean Construction Co.*, 254 F Supp 102, 110 (S.D.N.Y. 1966) aff'd on opin. below, 382 F 2d 991 (CA 2, 1967).

Appellant's petition erroneously states there is an inter-circuit conflict with the decision herein, which was affirmed by the Court of Appeals for the Second Circuit, and that Court's own decision in *Roloff* v. *Arabian American Oil Company*, 421 F 2d 240 (CA 2, 1970). Perhaps he means

an "intra-circuit" conflict. In any event, there is no such conflict because *Roloff* is inapplicable. In *Roloff*—

1. There was no stipulation of dismissal on the merits for the purpose of taking an appeal. The trial court dismissed the second count of the complaint on substantive grounds and the plaintiff moved to dismiss the remainder of the complaint so he could appeal the dismissal of the second count.

2. It was the defendant which in effect was allowed to amend its answer on its motion for summary judgment, not the plaintiff.

*Roloff* has nothing to do with this case. Appellant cannot rely on it, nor can he argue that he is being deprived of his day in court. As Judges Weinfeld and Wyatt both pointed out, appellant has already had that opportunity.

## II

### This action is barred by limitation of time.

Under the New York statute, CPLR §§203 and 213, an action upon a contractual obligation or liability express or implied, except as provided in Article 2 of the Uniform Comercial Code, must be commenced within six years after the cause of action has accrued. A cause of action "accrues" at the "time when the plaintiff first became enable to maintain the particular action in question." (*Cary* v. *Koerner*, 200 N.Y. 253, 259).

This action was commenced December 10, 1970. The last payment made to Cauldwell-Wingate, for which appellant

claims a share, was made on November 9, 1964. The action, therefore, was not timely instituted (App. 26).

Appellant attempts to convert an action for alleged breach of contract into one for conspiracy to defraud, in an effort to circumvent the statute of limitations. The essence of his action, however, is contract. A similar effort was rejected by a New York court in *Wolf* v. *Glazer,* 17 Misc. 2d 522, 523, which stated:

> "* * *. The fraud alleged constitutes, at most, fraud in the performance of the contract. Under such pleadings a cause of action is alleged only for breach of contract * * * (citations omitted). The cause of action such as is alleged in the complaint herein arises not upon discovery of the facts constituting the breach of contract, but upon the happening of the breach itself. (citing cases)."

## III

**The complaint fails to state a claim on which relief can be granted.**

Appellant has not seen fit to include his complaint in his Appendix. However, Judge Wyatt's opinion points out that the complaint is insufficient as a matter both of substantive and procedural law (App. 27). Appellant's lengthy recital of Federal Regulations emphasizes the invalidity of any agreement to pay a contingent fee. Judge Wyatt found that even if appellant's claimed agreement were specific enough to be enforced, it would be void and appellant could not recover (App. 27).

## IV

**Appellant has shown no reasons for the granting of the writ.**

Appellant has not demonstrated that the judgment of the Court of Appeals for the Second Circuit conflicts with any decision or law or otherwise comes within any of the grounds for granting the writ, which are specified in Rule 19(1)(b) of this Court.

## Conclusion

**For the foregoing reasons the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit should be denied.**

Respectfully submitted,

AARON GOODSTEIN
BENJAMIN WM. MEHLMAN
*Attorneys for Respondents*

## Appendix

### Judgment of Affirmance of the Court of Appeals for the Second Circuit Dated April 6, 1972

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of April one thousand nine hundred and seventy-two

Present:

Hon. TOM C. CLARK, Associate Justice,
Hon. J. EDWARD LUMBARD, Circuit Judge,
Hon. HAROLD R. TYLER, District Judge.

---

MATTHEW O. REILLY,

*Plaintiff-Appellant,*

*v.*

CAULDWELL-WINGATE COMPANY, INC., a Corporation of the State of New York or one of the other states of the United States, BERNARD J. ROSEN, MAX STAHL and STANLEY STAHL,

*Defendants-Appellees.*

---

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. Daniel Fusaro,
Clerk

AUG 29 1972

MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-5064

MATTHEW O. REILLY,
Petitioner,

CAULDWELL-WINGATE COMPANY, INC., BERNARD J. ROSEN, MAX STAHL and STANLEY STAHL,
Respondents.

Pet Supplemental Reply BRIEF

# PETITIONER'S SUPPLEMENTAL PETITION AND REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-5064

MATTHEW O. REILLY,

Petitioner,

vs.

CAULDWELL-WINGATE COMPANY, INC., BERNARD J. ROSEN and MAX STAHL,

Respondents.

**PETITIONER'S REPLY AND SUPPLEMENTAL PETITION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.**

Petitioner respectfully supplements the petition herein and replies to respondents' brief in opposition.

## ADDITIONAL QUESTIONS PRESENTED

A. Are the CFR Sections controlling contingent fees applicable where Government contracting agency (FHA) is only in the position of a mortgage in possession (by assignment of the mortgage) at the time of contracting and did not acquire title until after completion of the subject contract?

B. Can the CFR provisions be used, or were they intended, to protect, by indirection, a private owner with property involving an FHA mortgage thereon?

## ADDITIONAL STATEMENT

The subject-matter of the action herein is work labor and services performed by the petitioner in furtherance of a joint-venture agreement with the defendants-respondents; which, involved construction contracts affecting private properties owned by the Taylor International Corporation and their limited partners Frank & Norman Sidenwurm and a wholly owned subsidiary Gregory Park Inc., of Delaware. These companies were owners of the properties until the FHA took possession thereof by foreclosure proceedings culminating in judgments as follows:

1. Gregory Park No. 1, Inc., Oct. 19, 1966; wherein a judgment was secured amounting to $1,781,933.14.

2. 555 Mt. Prospect Ave., Newark, March 27, 1968; wherein a judgment was secured amounting to $3,341,784.53.

3. 515 Mt. Prospect Ave., Newark, Oct. 28, 1970; wherein a judgment was secured amounting to $562,253.05.

The total judgements secured by the United States government amounted to $5,685,970.72; and, although the private owners, as aforesaid, of the properties affected were in default of their mortgage obligations Oct. 1, 1962 and were in re-organization between 1963 and 1965, they were permitted to milk the corporate assets and make further arrangements with the defendant-respondents herein to secure windfall profits as alleged in the complaint.

It is an established fact, as demonstrated by affidavits herein included in the record that the windfall profits amounted to a total of $3,349,995.00; which, as alleged, was secured by the defendant-respondents and their co-conspirators who were unjustly enriched at the expense of the plaintiff-petitioner.

At the time that the private owners, as aforesaid, were in default on the mortgages in question, concerning completion of the construction contracts with the sub-contractors, there was a balance due and owing amounting to $2,278,281.00. However, the private owners in league with the defendant-respondents, with the acquiescence of the FHA arranged contracts for the completion of the project for $5,628,276.00.

Additionally, the FHA deferred the foreclosure proceedings, quite cleverly, in order that this windfall might be realized by the defendant-respondents herein; and, too, in order that the private owners, the Taylor International Corporation and their aforesaid partners could continue reaping the harvest of funds under their control.

The fact that the FHA did not acquire title to the premises in question until the foreclosure proceedings, as aforementioned, is significant in that petitioner was not aware of it until after the commencement of these proceedings; and, furthermore, the private ownership of the said premises places in question the position of the defendant-respondents respecting the construction contracts involved in the claims herein.

The joint venture agreement between the petitioner and the respondents was for new construction business affecting private interests and properties; and, had no relationship to the United States government.

According to the agreement as alleged in the complaint the parties were to share in profits in accord with a schedule of percentages of the total amounts involved in contracts for new construction work.

The issues surrounding these claims have never been litigated or resolved on the merits.

## POINT I

### CFR CONTROL OF CONTINGENT FEES IS FOR PROTECTION OF GOVERNMENT, NOT PRIVATE ENTREPRENEURS DEFAULTING ON MORTGAGES WHICH INURE TO GOVERNMENT AFTER THE EVENT.

The elements set forth hereinabove, newly discovered by petitioner and not raised below, or in the petition, are offered under the authority of *Duigan v. U.S.*, 274 U.S. 195, 200.

It is respectfully submitted that the new questions raised herein raise a question of great public interest meriting this Court's resolution, particularly in view of the large number of FHA mortgages extant, an unascertainable number of which may, by mortgage defaults, result in assignment to the FHA, as herein.

It is further respectfully submitted that the purpose of the CFR control over contingent fees is not to protect private ownership, directly or indirectly, from contingent fees.

To apply the CFR restriction (ignoring, for the mement, the exemptions therefrom) to the contract at bar is to apply the "protection" thereof to private ownership, as, for example, the

property could have remained in private ownership (without the FHA's eventual acquisition of title), in which event private entrepreneurs would have borne the cost of the contingent fee through re-imbursement to the FHA.

So applied, the CER is an unconstitutional abridgement of the right to contract.

## POINT II

**THE INTER-CIRCUIT CONFLICT WITH THE AFFIRMANCE HEREIN BY THE SECOND CIRCUIT COURT OF APPEALS WAS BROUGHT INTO CLEAR FOCUS BY THE RECENT DECISION BY THE THIRD CIRCUIT IN *SMITH, ET AL V. PITTSBURGE GAGE AND SUPPLY COMPANY, —— F.2d —— (NO. 71-1390, FILED JULY 17, 1972).***

The decision below conflicts with the recent Third Circuit decision in *Smith et al v. Pittsburgh Gage And Supply Co.*, —— F.2d —— (No. 71-1390, Filed July 17, 1972), which conflict warrants this court's resolution of the important practice question of the "inflexibility" of the res judicata doctrine when it is applied to deny justice.

In *Smith*, the Third Circuit wrote, per Rosenn, C.J. (p. 6 of slip opinion):

> "However, jurisdictional dismissals do not bar further litigation of the cause of action when the subsequent complaint cures the jurisdictional defect."

and at p. 7:

> "In determining the existence of a disputed issue of material fact on motion for summary judgment, a district court should resolve all inferences, doubts and issues of

credibility against the moving party. *** Despite the liberalization of F.R. Civ. P. 56 in 1963 to permit increased freedom to trial courts to grant summary judgments, it is improper to deprive a party of a full hearing on the merits unless it is clear on the undisputed facts before the court that no material issue of fact has still to be resolved.

* * *

While the doctrine of res judicata is meant to foster judicial efficiency and protect defendants from oppression of repeated litigation, it should not be applied inflexibly to deny justice."

In the case at bar, petitioner has not had a trial on the merits on his claim, although Judge Weinfeld, in the first action, held, on respondents' motion for summary judgment relying on the CFR bar, that issue should be determined only after a full trial.

Petitioner, therefore, has been denied justice by the grant of summary judgment in the second action, over-riding Judge Weinfeld's decision and order, and has been denied the trial of his claims that justice and Judge Weinfeld's order required.

## POINT III

### RESPONDENTS' RELIANCE ON *WOLT v. GLAZER*, 17 MISC. 2d 522, 523 IS MISPLACED.

In their brief, Point II, at p. 5, respondents mistakenly rely on *Wolf v. Glazer*, 17 Misc. 2d 522, 523, Appellate Term (1959) without identifying the court or noting the date thereof, in an effort to over-come the impact of the appellate decisions cited by petitioner in Point II of the petition, at p. 15, holding that a

cause of action for actual fraud (as herein) does not accrue until discovery thereof (*Altman v. Finkel* (1st A.D. 1945), 52 N.Y. Supp. 2d 634, 638; *Hearn 45th Corp. v. Jano* (1940), 283 N.Y. 139, 141, 27 N.E. 2d 814, 815; *Nasaba Corp. v. Harfred Realty Corp.* (1942), 287 N.Y. 290, 39 N.E. 2d 243.)

Despite what respondents rely on in *Wolf*, the higher and highest, New York courts clearly hold that petitioner's time runs from discovery of the fraud in 1968, the statute of limitations therefore running till 1974, and see CPLR 213, subpar. 9, providing that time, in an action based on actual fraud, runs from time of discovery (added L. 1965, C. 248), thereby codifying the case law cited.

## POINT IV

### RESPONDENTS FAIL TO ANSWER PETITIONER'S RES JUDICATA POINT, IN POINT III OF PETITION, THEREBY ADMITTING VALIDITY THEREOF.

Respondents have not answered petitioner's res judicata argument, raised in Point III, Petition (pp. 15-16), and have thereby tacitly admitted the validity of petitioner's argument thereon.

In the face of that tacit admission, petitioner relies on the discussion thereof in the petition (pp. 15-16).

## CONCLUSION

For the reasons set forth herein and in the petition, petitioner respectfully prays this Court to grant its Writ of Certiorari to the Court of Appeals For the Second Circuit to review the judgment thereof.

Respectfully submitted,

JACOB RASSNER
Counsel for petitioner

Of counsel and on the brief:

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